Yong Thsu Khin & Anor v MMCE Proties & Anor and another action

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–81 OF 1992 AND ORIGINATING SUMMONS NO R8–24–70 OF 1900

SURIYADI J

3 MAY 2005

Civil Procedure — Discontinuance — Leave of court — Application for leave to discontinue — Whether court should grant leave if no injustice will be caused

Civil Procedure — Discontinuance — Non compliance with procedure — Whether procedural matters secondary to justice of matter

Civil Procedure — Discontinuance — Without leave — Whether notice of discontinuance could be filed without leave of court — Rules of the High Court 1980 O 21 rr 2, 3(1)

The late KR Ramasamy and N Letchumanan were the registered owners ('theregistered owners') of a piece of land identified as CT No 22358 Lot 623, Mukim Kajang, Daerah Ulu Langat, Selangor ('the said land'). Pursuant to a joint venture agreement ('the JVA') with a company called MMCE Properties Sdn Bhd ('MMCE') dated 23 September 1985, the latter together with the two registered owners had agreed to develop the said land. Some of the conditions were that: (i) the registered owners were to receive RM250,000 ('the said money') from MMCE and in the event MMCE were to withdraw from the JVA the registered owners were to return the said money together with interest; (ii)after that withdrawal, and if the refund of the said money together with the interest were not satisfied within the given time, then MMCE would be entitled to sell the said land so as to pay for the refund, with the balance to be returned to the registered owners; and (iii) any dispute that emanated from the JVA would be resolved by an arbitrator.

On 8 December 1986 MMCE notified the registered owners of their intent to withdraw from the JVA and demanded the return of the said money. As the registered owners had failed to refund the said money the matter was referred to arbitration. The arbitrator made an award on 29 January 1988, ordering the registered owners to refund the said money by 30 April 1988, failure of which the land was to be transferred to MMCE or sold. The registered owners failed to refund the said money by 30 April 1988, and as it wanted to enforce the award, MMCE filed Originating Summons No R8–24–70 of 1990 ('first action') at Kuala Lumpur, against the registered owners on 17 September 1990. On 14October 1991 the High Court pronounced the order that MMCE could enforce the arbitration award against the registered owners. This order was set aside on 27 July 1992. Sometime on 28 February 1992, Civil Suit No 22–81

of 1992 ('the second action') was filed in Shah Alam High Court. This action was filed by Yong Thsu Khin ('Yong') and Annie Quah Lay Nah ('Annie') against MMCE and its lawyer one Narayan Mohandas. The latter suit came about as it was alleged that sometime on 24 September 1991, Yong and Annie were persuaded and convinced by MMCE that they were entitled to sell the impugned property, whereupon a Sales & Purchase Agreement ('S&P') wereexecuted between them. Regretfully as that S&P could not be satisfied thesecond action thereafter was litigated, amongst others, for a specific performance and to prevent the defendants of the second action from further transacting with the impugned land. Pursuant to this second action, the High Court on 15 April 1993 ordered that the original land title be deposited into court, and MMCE be prevented from transacting and selling the land to anyone except the plaintiffs, until its final disposal. Regardless of the above 15 April 1993 order, sometime on 17 August 1993, the registered owners had sold the said land to a company called Dahan Cipta Sdn Bhd for a consideration sum of RM500,000 together with 17 units of houses. From that sum RM50,000 was to be paid to the registered owners through their solicitors. The registered owners also agreed not to deal further with the land. From the other proceeds of this transaction the registered owners were able to refund all the monies they had received from MMCE. The plaintiff, ie MMCE by way of filing notice of discontinuance had discontinued that first action on 29 November 1993 ('NOD'). The NOD was also served on the plaintiffs of the second action through their solicitors. At the wings to intervene in that first action were the plaintiffs of the second action, their locus premised on the S&P of 24 September 1991 between them and MMCE. Despite their application not satiated, the NOD was still served on them. Despite the filing of the NOD, the court still gave an 'order in terms' to the pending application of the plaintiffs of the second action, to be brought in as interveners of the first action. This order was given on the very next day, ie 30 November 1993. On 4 May 1994 pursuant to another High Court order the first and the second actions were consolidated. By a consent judgment dated 2 March 1999, the first and second plaintiffs of the second action, had agreed that the impugned land be transferred to the latter two plaintiffs. From the two actions and despite the NOD of the first action filed, four applications were filed by the contending parties. Pursuant to the first action, the son of the first registered owner (the initial first defendant having passed away), had filed encls 132 and 124. These enclosures have respectively prayed that the NOD be maintained and the 'interveners' order which was issued the next day be set aside (encl 132), and that the consent order of 2 March 1999 between the plaintiffs of the second action, MMCE and N Letchumanan be set aside (encl 124). Also pursuant to the first action, the second successful intervener had filed encls 156 and 114, respectively to set aside encls 132 and 124 mentioned above.

Held, dismissing all the applications with costs:

(1) A cursory reading of O 21 r 3(1) of the Rules of The High Court 1980 ('RHC'), read together with r 2, reveal that an originating summons may only be discontinued with leave of the court pursuant to an application by summons. As regards to an action by writ, which excludes an action begun by an originating summons, may be discontinued by a plaintiff without leave of the court at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect. Apart from the permitted statutory ground legislated under r 2, in other circumstances whether begun by writ or otherwise, leave is a necessity for the discontinuance of such action (see para 20).

(2) When applications are made for leave to discontinue a case, more often than not courts will grant it. This is so as it is undesirable to compel a plaintiff to pursue any litigation against his will, so long as no injustice will be caused to the defendant (see para 22); *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876; [1977] 2 All ER 591 followed.

(3) Backed by O 92 r 4 of the RHC 1980, which empowers the court with all the powers that are necessary to fulfil itself as a court of law, procedural matters are now secondary to the justice of the matter, and the defendants of the first action did not complain of the dearth of leave, with O 21 r2(4) of the RHC statutorily allowing withdrawal without leave if certain preconditions are satisfied, the court was satisfied that the NOD was good and hence effective. The procedural inadequacies of the NOD, if any for purposes of this case was irrelevant (see para 25).

(4) The first action come 30 November 1993, was thus effectually terminated. Likewise in the current case, anything that was filed after that effective discontinuance date would be invalid, and must necessarily be dismissed. Even though the discontinuance had taken place without leave, no prejudice or injustice had occurred to the defendants or anyone (see para 28).

[**Bahasa Malaysia summary**

Mendiang KR Ramasamy dan N Letchumanan adalah pemilik-pemilik berdaftar ('pemilik-pemilik berdaftar') sebidang tanah yang dikenali sebagai CT No 22358 Lot 623, Mukim Kajang, Daerah Ulu Langat, Selangor ('tanah tersebut'). Menurut perjanjian usahasama ('JVA') dengan sebuah syarikat yang bernama MMCE Properties Sdn Bhd ('MMCE') bertarikh 23 September 1985, MMCE bersama dengan kedua-dua pemilik berdaftar telah bersetuju untuk memajukan tanah tersebut. Antara syarat-syaratnya adalah: (i) pemilik-pemilik berdaftar akan menerima RM250,000 ('wang tersebut') dari MMCE

dan jika MMCE menarik diri dari JVA tersebut, pemilik-pemilik berdaftar akan memulangkan kembali wang tersebut bersama dengan faedah; (ii) selepas penarikan diri, dan jika wang tersebut bersama faedah tidak dilunaskan dalam masa yang diberi, MMCE berhak untuk menjual tanah tersebut agar wang tersebut dapat dilunaskan, bakinya akan dikembalikan kepada pemilik-pemilik berdaftar; dan (iii) sebarang pertikaian yang berpunca dari JVA akan diselesaikan oleh seorang penimbangtara.

Pada 8 Disember 1986 MMCE memberi notis kepada pemilik-pemilik berdaftar mengenai niatnya untuk menarik diri dari JVA tersebut dan menuntut pengembalian wang tersebut. Oleh kerana pemilik-pemilik berdaftar gagal untuk mengembalikan wang tersebut, perkara ini dirujuk kepada timbangtara. Penimbangtara memberi award pada 29 Januari 1988, memerintahkan pemilik-pemilik berdaftar untuk mengembalikan wang tersebut sebelum atau pada 30April 1988, kegagalan berbuat demikian akan mengakibatkan tanah tersebut dipindahmilik kepada MMCE atau dijual. Pemilik-pemilik berdaftar gagal mengembalikan wang tersebut pada 30 April 1988, dan oleh kerana ia ingin menguatkuasakan award tersebut, MMCE memfailkan saman pemula No R8–24–70 tahun 1990 ('tindakan pertama') di Kuala Lumpur, terhadap pemilik-pemilik berdaftar pada 17 September 1990. Pada 14 Oktober 1991 Mahkamah Tinggi memberi perintah yang MMCE boleh menguatkuasakan award timbangtara tersebut terhadap pemilik-pemilik berdaftar. Perintah ini telah diketepikan pada 27 Julai 1992. Pada 28 Februari 1992, Saman Sivil No 22–81 tahun 1992 ('tindakan kedua') difailkan di Mahkamah Tinggi Shah Alam. Tindakan ini difailkan oleh Yong Thsu Khin ('Yong') dan Annie Quah Lay Nah ('Annie') terhadap MMCE dan peguamcaranya Narayan Mohandas. Tindakan guaman ini berpunca kerana dakwaan yang bahawa pada 24 September 1991, Yong dan Annie telah dipujuk dan diyakinkan oleh MMCE bahawa mereka berhak untuk menjual tanah tersebut, di mana satu perjanjian jual beli ('S&P') telah dimeterai di antara kedua-dua pihak. Malangnya, oleh kerana S&P tersebut tidak dapat disempurnakan, maka tindakan kedua dimulakan, yang memohon antara lain, untuk satu perlaksanaan spesifik dan untuk menghalang defendan-defendan dalam tindakan kedua dari berurusniagakan tanah tersebut. Berikutan dari tindakan kedua tersebut, Mahkamah Tinggi pada 15 April 1993 telah memerintahkan agar dokumen hakmilik tanah yang asli didepositkan dimahkamah, dan MMCE dihalang dari berurusniagakan dan menjual tanah tersebut kepada sesiapa pun melainkan plaintif-plaintif, sehinggalah perkara ini diselesaikan. Tanpa menghiraukan perintah bertarikh 15 April 1993 tersebut, pada 17 Ogos 1993, pemilik-pemilik berdaftar telah menjual tanah tersebut kepada sebuah syarikat yang bernama Dahan Cipta Sdn Bhd untuk jumlah balasan sebanyak RM500,000 bersama dengan 17 unit rumah. Dari jumlah tersebut, RM50,000 perlu dibayar kepada pemilik-pemilik berdaftar melalui peguamcara mereka. Pemilik-pemilik berdaftar juga bersetuju untuk tidak berurusan lagi dengan tanah tersebut. Dari lebihan hasil kutipan transaksi ini, pemilik-pemilik berdaftar

dapat mengembalikan kesemua wang yang mereka terima dari MMCE. Plaintif, iaitu MMCE telah memberhentikan tindakan pertama dengan memfailkan notis pemberhentian pada 29 November 1993 ('NP'). NP juga diserahkan kepada plaintif-plaintif di dalam tindakan kedua melalui peguamcara mereka. Plaintif-plaintif di dalam tindakan kedua ingin mencelah tindakan pertama, berdasarkan bahawa S&P bertarikh 24 September 1991 di antara mereka dan MMCE. Walaupun permohonan mereka belum diselesaikan, NP tersebut juga diserahkan terhadap mereka. Walaupun setelah memfailkan NP, mahkamah masih memberi perintah seperti yang dipohon kepada permohonan plaintif-plaintif tindakan kedua yang belum selesai itu untuk diterima sebagai pencelah dalam tindakan pertama. Perintah tersebut diberikan pada hari keesokannya, iaitu 30 November 1993. Pada 4 Mei 1994 berikutan dari satu lagi perintah Mahkamah Tinggi yang lain, tindakan pertama dan kedua disatukan. Melalui penghakiman persetujuan bertarikh 2 Mac 1999, plaintif pertama dan kedua dalam tindakan kedua, telah bersetuju bahawa tanah tersebut dipindahmilikkan kepada kedua-dua plaintif itu. Dari dua tindakan ini dan walaupun NP tindakan pertama telah difailkan, empat permohonan difailkan oleh pihak-pihak yang bertentangan. Di bawah tindakan pertama, anak kepada pemilik berdaftar pertama (defendan pertama yang asal telah meninggal dunia), telah memfailkan lampiran 132 dan 124. Lampiran-lampiran ini memohon bahawa NP tersebut dikekalkan dan perintah berhubung dengan 'pencelah-pencelah' yang dikeluarkan pada keesokan harinya itu diketepikan (lamp 132), dan bahawa perintah persetujuan bertarikh 2Mac1999 di antara plaintif-plaintif di dalam tindakan kedua, MMCE dan N Letchumanan diketepikan (lamp 124). Juga di bawah tindakan pertama, pencelah kedua yang berjaya itu telah memfailkan lampiran 156 dan 114, yang masing-masingnya untuk mengetepikan lampiran 132 dan 124.

Diputuskan, menolak semua permohonan dengan kos:

(1) Sepintas lalu A 21 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), dibaca bersama dengan k 2, menampakkan bahawa sesuatu saman pemula hanya boleh diberhentikan dengan kebenaran mahkamah melalui satu permohonan melalui saman. Berhubung dengan tindakan melalui writ, yang mana tidak termasuk sesuatu tindakan yang dimulakan dengan saman pemula, boleh diberhentikan oleh plaintif tanpa kebenaran dari mahkamah pada bila-bila masa sebelum 14 hari selepas serahan pembelaan ke atasnya atau, jika terdapat dua atau lebih defendan-defendan, pembelaan terakhir yang diserahkan ke atasnya, dengan menyerahkan satu notis dalam Borang 36. Selain dari alasan berkanun di bawah k 2, dalam keadaan-keadaan lain sama ada tindakan bermula dari writ atau sebaliknya, kebenaran adalah perlu untuk memberhentikan tindakan (lihat perenggan 20).

(2) Apabila permohonan-permohonan dibuat untuk mendapat kebenaran memberhentikan sesuatu kes, mahkamah selalunya akan membenarkan

permohonan itu. Ini adalah kerana ianya tidak wajar untuk memaksa plaintif meneruskan litigasi tanpa kehendaknya, asalkan tiada ketidakadilan berlaku ke atas defendan (lihat perenggan 22); *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876; [1977] 2 All ER 591 diikuti.

(3) Disokong oleh A 92 k 4 KMT 1980, yang memberi kuasa kepada mahkamah dengan kuasa-kuasa perlu untuk menjalankan tanggungjawabnya sebagai satu mahkamah undang-undang perkara-perkara prosidur sekarang ini adalah perkara kedua selepas keadilan, dan defendan-defendan didalam tindakan kedua tidak membantah ketiadaan kebenaran, dengan A 21 k 2(4) KMT yang memberi kebenaran berkanun penarikan tanpa kebenaran jika prasyarat-prasyarat tertentu dipenuhi, mahkamah berpuashati bahawa NP itu adalah teratur dan berkesan. Kecacatan prosedur NP tersebut, jika ada adalah tidak relevan di dalam kes ini (lihat perenggan 25).

(4) Tindakan pertama setelah 30 November 1993, dengan itu telah secara efektifnya ditamatkan. Sama juga di dalam kes semasa, apa-apa yang difailkan selepas tarikh efektif pemberhentian adalah tidak sah dan dengan itu mestilah ditolak. Walaupun pemberhentian dibuat tanpa kebenaran, tiada prejudis atau ketidakadilan berlaku ke atas defendan-defendan atau sesiapa pun (lihat perenggan 28).]

Notes

For a case on discontinuance without leave, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2168.

For a case on leave of court, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2160.

For cases on discountinuance generally, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2155–2168.

Cases referred to

Conybeare v Lewis (1880) 13 Ch D 469 (refd)

Covell Matthews & Partners v French Wools Ltd [1977] 1 WLR 876; [1977] 2 All ER 591 (folld)

DP Vijayandran v Karpal Singh [1992] 1 CLJ 119 (refd)

Megat Najmuddin Data' Seri Dr Megat Khas v Bank Bumtputra (M) Bhd [2002] 1 MLJ 385 (refd)

Pacific Centre Sdn Bhd v Untied Engineers (M) Bhd [1984] 2 MLJ 143 (refd)

Paul Raj a/l Samy Raj v Annamalar a/p Anthonysamy [2003] 6 MLJ 130 (refd)

Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors [1998] MLJU 227 (refd)

United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd [1996] 2 AMR 2412 (refd)

Legislation referred to

Evidence Act 1950 s 114(e)
National Land Code 1965 s 340
Rules of the High Court 1980 O 21 r 2, (4), 3, (1), 6, O 92 r 4

CT Annathurai (PM Mahalingam and Sharmala Batumalai with him) (Hamzah Sulaiman & Partners) for the second plaintiff.

T Kuhan (Mohd Khairi with him) (Badri Kuhan Yeoh & Ghandi) for the first and second defendants.

Nadzrin Wok Nordin (Sahidi Mohamad and Putri Marlyna Megat Majid with him) (Nadzrin Kuok Puthucheary & Tan) for the first defendant in the Suit No R8–24–70 of 1990.

S Yogan (Ram Yogan & Associates) for the intervener.

Suriyadi J:

[1] The late KR Ramasamy and N Letchumanan were the registered owners (hereinafter referred to as 'the registered owners') of a piece of land identified as CT No 22358 Lot 623, Mukim Kajang, Daerah Ulu Langat, Selangor (thereafter referred to as 'the said land'). Pursuant to a joint venture agreement ('the JVA') with a company called MMCE Properties Sdn Bhd (thereafter referred to as 'MMCE'), dated 23 September 1985, the latter together with the two registered owners had agreed to develop the said land. Some of the conditions were that:

(i) MMCE was to develop the land and thereafter to obtain the necessary permissions;

(ii) the registered owners were to receive RM250,000 (hereinafter referred to as 'the said money') from MMCE;

(iii) MMCE was entitled to withdraw from the JVA after a minimum of two months notice have been given to the registered owners;

(iv) in the event MMCE were to withdraw from the JVA the registered owners were to return the said money together with interest at a rate of 18% per year beginning from 23 September 1985 until full and final settlement;

(v) after that withdrawal, and if the refund of the said money together with the interest were not satisfied within the given time, then MMCE would be entitled to sell the said land so as to pay for the refund, with the balance to be returned to the registered owners; and

(vi) any dispute that emanated from the JVA would be resolved by an arbitrator.

[2] On 8 December 1986 MMCE notified the registered owners of their intent to withdraw from the JVA. In that notice MMCE demanded the return

of the said money. As the registered owners had failed to refund the said money the matter was referred to arbitration. The arbitrator thereafter made an award on 29 January 1988, ordering the registered owners to refund the said money by 30 April 1988, failure of which the land was to be transferred to MMCE or sold.

[3] As the registered owners had failed to refund the said money by the adjudged date of 30 April 1988, and as it wanted to enforce the award MMCE had thereafter filed Originating Summons R8–24–70 of 1990 ('first action') at Kuala Lumpur, against the registered owners on 17 September 1990. On 14 October 1991 the High Court pronounced the order that MMCE could enforce the arbitration award against the registered owners. Unfortunately this order was set aside on 27 July 1992.

[4] Sometime on 28 February 1992, a suit was filed at the Shah Alam High Court and given the reference number of Civil Suit 22–81 of 1992 (hereinafter referred to as 'the second action'). This action was filed by Yong Thsu Khin and Annie Quah Lay Nah, against the abovementioned MMCE and its lawyer one Narayan Mohandas. The latter suit came about as it was alleged that sometime on 24 September 1991, Yong and Annie were persuaded and convinced by MMCE that they were entitled to sell the impugned property, whereupon a sales and purchase agreement were executed between them. The two registered owners were not involved in this transaction. The consideration sum was RM400,000. Yong and Annie had promptly paid RM40,000 to N. Mohandas who had held the money as stakeholder. Regretfully as that S&P could not be satisfied the second action thereafter was litigated, amongst others, for a specific performance and to prevent the defendants of the second action from further transacting with the impugned land. Pursuant to this second action, the High Court on 15 April 1993 ordered that the original land title be deposited into court, and MMCE be prevented from transacting and selling the land to anyone except the plaintiffs, until its final disposal.

[5] Regardless of the above 15 April 1993 order, sometime on 17 August 1993, the registered owners had sold the said land to a company called Dahan Cipta for a consideration sum of RM500,000 together with 17 units of houses. From that sum RM50,000 was to be paid to the registered owners through their solicitors. The expenses incurred whilst in the process of withdrawing any caveats over the said land would be paid by the balance. The registered owners also agreed not to deal further with the land. Their transaction comprised two S&Ps executed respectively on 17 August 1993 and 16 June 1995 for the impugned land, with the registered owners as vendors, and Dahan Cipta Sdn Bhd as the purchaser.

[6] From the other proceeds of this transaction the registered owners were able to refund all the monies they had received from MMCE. As far as the owners were concerned, so long as the sum owing had been paid up, the

substratum of the matter against them would have dissipated. With the return of that sum, MMCE was equally satisfied that it had no more cause of action against the registered owners. From the point of view of the registered owners any agreements between MMCE and the plaintiffs of the second action were no concern of theirs. Similarly, as far as I could see any dealings made by the registered owners with Dahan Cipta Sdn Bhd was no concern of MMCE either. I had to bear in mind that during this long period and despite all the on-goings, beefed up by the ups and down of the case, the titles of the two defendants of the first action (the registered owners) were never abrogated at any time. In a word they had indefeasible title by virtue of s 340 of the National land Code 1965 over the impugned land at all material time, and could deal with it in any Tanner they wanted. I could appreciate this transaction with Dahan Cipta, as the registered owners merely wanted instant cash to pay off their debts with MMCE, and end the legal wrangling saga between them once and for all.

[7] To the satisfaction of the two registered owners-cum defendants, the plaintiff ie MMCE through Tetuan N Mohandas had discontinued that first action on 29 November 1993 (NOD). This notice was also served on the plaintiffs of the second action through their solicitors, namely, M/s K Karthigesu & Co (see admission as per exh SS–1 encl 132C). At the wings to intervene in that first action were the plaintiffs of the second action, their locus premised on the S&P of 24 September 1991 between them and the said MMCE. Perhaps because of this reason, despite their application not satiated, the NOD was still served on them.

[8] Regretfully, despite the filing of the notice of discontinuance (NOD) on 29 November 1993, the court still gave 'order in terms' to the pending application of the plaintiffs of the second action, to be brought in as interveners of the first action. This order was given on the very next day ie 30 November 1993. That order also included the transfer of the first action to the Shah Alam High Court. With respect once the discontinuance had taken place, in this case conditional on it being valid and effective immediately, the application of the interveners and their connected prayers must be vacated. As an analogy, in *Conybeare v Lewis* (1880) 13 Ch D 469, the court there had held that any appeal pending in that action will be ipso facto vacated upon the action being discontinued. Jessel MR in clear terms had opined that:

> Notice of discontinuance of the action having been given, the appeal comes to an end, and we cannot make any other order than to strike it out of the paper.

[9] To reiterate, conditional on the NOD being valid and effective immediately, that discontinuance had removed the plaintiff from the proceedings, and had left no part of the action to survive (The *Supreme Court Practice 1997* (1) p 379). I seek solace also from the case of *The Saxicava* (1924) P 131 (see also *Malaysian High. Court Practice 1998* (Desk Ed) 807), where the

Court of Appeal there similarly had construed that the effect of discontinuance was to remove the plaintiff from the proceedings. The end product was that no interlocutory application was left for it to consider there.

[10] This 'dead' case continued its lively saga when on 4 May 1994 pursuant to another High Court order the first and the second actions were consolidated. The pertinent questions to be answered without doubt must be:

(i) was the notice of discontinuance good; and

(ii) what would the effect of that NOD be on subsequent applications to matters related to the parties, especially the orders pertaining to the interveners, the transfer of the discontinued action to Shah Alam, and later its consolidation with the second action, and of course as regards the relevant enclosures before me?

[11] Naturally the plaintiffs of the second action, by now being aware of the abovementioned Dahan Cipta transaction, was extremely displeased as the latter transaction would have meant that the 15 April 1993 order had been violated. On hindsight and on a brief perusal, some rather interesting questions could evolve from that violation, founded on the available set of facts to be resolved in Civil Suit No 22–81 of 1992 later. Some of them could be:

(i) did the 15 April 1993 order gag the registered owners from dealing with the property too;

(ii) if the first question is in the negative, as registered owners could they not sell that impugned property to Dahan Cipta Sdn Bhd;

(iii) was MMCE involved in that transaction; and

(iv) if not, and of which transaction it was not privy to, could any blame be piled on it?

[12] By a consent judgment dated 2 March 1999, the first and second plaintiffs of the second action, MMCE and N Letchumanan *inter alia* had agreed that the impugned land be transferred to the latter two plaintiffs. Again these relevant questions must be answered, namely:

(i) under what authority did the plaintiffs of the second action, MMCE and Letchumanan act collectively to transfer the impugned property to Yong Tshu Khin and Annie Quah Lay Nah, without the consent of the other registered owner;

(ii) were the rights of MMCE not terminated the moment the JVA with the registered owners were abandoned;

(iii) were the rights of MMCE over the land not terminated when the arbitrator's award was satisfied when its monies were refunded; and

(iv) was it not a recognition of its cause of action having dissipated when it discontinued the first action on 29 November 1993?

[13] From the two actions of Originating Summons R8-24-70-1990 (first action) and Civil Suit 22–81 of 1992 ('second action'), and despite the notice of discontinuance of the first action on 29 November 1993, four applications were filed by the contending parties. Pursuant to the first action, the son of the first registered owner (ie the initial first defendant having passed away), had filed encls 132 and 124. These enclosures have respectively prayed that the Notice of Discontinuance of 29 November 1993 be maintained and the interveners' order which was issued the next day be set aside (encl 132), and that the consent order of 2 March 1999 between the plaintiffs of the second action, MMCE and N Letchumanan be set aside (encl 124). Also pursuant to the first action, the second successful intervener had filed enclosures 156 and 114, respectively to set aside encls 132 (application to maintain the NOD) and 124 (to set aside the consent order of the second action dated 2 March 1999). Due to encls 132 and 156 being technically intertwined they could be heard together, whilst encl 124 be heard together with encl 114. That being so if OIT were given to encl 132, encl 156 thus must be dismissed and vice versa, and if OIT is given to encl 124 then encl 114 must be dismissed and naturally *vice versa*.

[14] Having gone through the voluminous files and documents it is my view that the key to resolving all the applications is the very notice of discontinuance of 29 November 1993. This view is held as despite the various contentious matters before me, projecting an appearance of being intricate, impossible and at times beyond comprehension, in reality the central issue revolves only around the narrow band of the impugned land. Similar to any package deal, if I were satisfied that the NOD was good, then past midnight of 29 November 1993, ie the moment time began to tick for 30 November 1993, the first action ceased to exist. Once the discontinuance takes effect, the life of that file is squeezed out and nothing can flow anymore from it. Something that is dead must remain dead and only a successful application to reinstate, review or appeal may possibly revive it. As none of the latter causes of actions were taken up by any party to resuscitate it, aggrieved or otherwise, within the statutorily permitted period, Originating Summons R8–24–70 of 1990 ('first action') and their contents for all intents and purposes have become mere pieces of papers, Not only could the intervener's action the next day not have been entertained by the judge, but even encls 132, 124, 156 and 114 have no legs to stand on. How could encls 132 and 156 which are intertwined with each other, and 124 intertwined with 114 have been filed, when there was no living case to permit their filing? In a gist all the applications that alluded to the first action for any prayers, after the discontinuance had become effective, must be dismissed without more. To reiterate the above view will only be valid if the NOD is found to be good and effective.

[15] The relevant question that must necessarily follow is, what is my vehicle or platform whereupon I could decide whether the NOD was good or otherwise, and thereafter state the consequential effects? It was quite obvious as regards

a registered litigation there was none. I could not allude to Civil Suit 22–81 of 1992 ('second action') to help me out, as all the applications had been filed under Originating Summons R8–24–70-1990 ('first action'). In a gist the former case, ie the second case was inadvertently left untouched by any applications.

[16] I now deal with the first poser, ie my vehicle or authority to determine the second question. As far as I can see, I am adequately armed to deal with this matter as:

(i) Order 92 r 4 of the RHC 1980 supplies me with the necessary discretion to deal with the matter adequately. This provision clearly declares that nothing in the rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. Edgar Joseph Jr J in *Pacific Centre Sdn Bhd v Untied Engineers (M) Bhd* [1984] 2 MLJ 143 at 147 had occasion to say 'it is clear that the inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law; to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner';

(ii) Section 114(e) of the Evidence Act 1950 allows me to presume that judicial and official acts have been regularly performed. That being so, when the court officials of MT1 headed by my Timbalan Pendafar allocated this file before me, administratively I could deal with the matter unhindered. I have to assume that he had performed the needful legwork and thereafter clearing administratively the way for my subsequent judicial consideration;

(iii) under PU(A) 197/2002, with its effective date being 16 May 2002, thenceforth a court or judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of the Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice, Therefore, with justice being central In any litigation, when administering any of the Rules the Court or a judge shall have regard to the justice of the particular case, and not merely on the technical non-compliance of those rules; and iv. all parties in this case have implicitly and expressly agreed that I deal with the matter in the way I deem fit, and thereafter resolve the matter expeditiously.

[17] Returning to the second question, naturally if I find the NOD to be good, then as said above without a case/file in existence, all the enclosures filed post 29 November 1993 must be perfunctorily dismissed. It follows to reason that all of them will have to be dismissed. Naturally with encls 124 and 114 dismissed the consent order of 2 March 1999 remains intact. Whether

that order may be exploited against the first registered owner, who was never privy to that agreement, will have to be left for the consideration of some other court.

[18] The procedural law as regards withdrawal and discontinuance of a case is enacted under O 21 of the Rules of the High Court 1980, with rr 2, 3 and 6 playing prominent roles. To start the discussion, O 21 r 3 RHC 1980 reads:

> (1) Except as providedby r 2, a party may not discontinue any action (whether begun by writ or otherwise) without the leave of the court…;
>
> (2) An application for the grant of leave under this rule may be made by summons.

[19] Order 21 r 2 of the Rules of the High Court 1980 reads:

> (1) The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect on the defendant concerned.'

[20] A cursory reading of O 21 r 3(1), read together with r 2 of the Rules of the High Court, reveal that an originating summons may only be discontinued with leave of the court pursuant to an application by summons. As regards an action by writ, which excludes an action begun by an originating summons, may be discontinued by a plaintiff without leave of the court, at any time not later than 14 days after service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 36 to that effect. Apart from the permitted statutory ground legislated under r 2, in other circumstances whether begun by writ or otherwise, leave is a necessity for the discontinuance of such action (r 3). To give a better picture, I refer to the case of *Paul Raj a/l Samy Raj v Annamalar a/p Anthonysamy* [2003] 6 MLJ 130 as an example, where the court had set aside an order of discontinuance. The reason for that setting aside was succinctly supplied under held (1), and it reads as follows:

> The notice of discontinuance did not comply with O 21 r 3(1) and (2) of the RHC. Not only did the applicant fail to obtain leave of the court to discontinue, he also arbitrarily and without an order of the court, granted himself the liberty to settle the action. Further, the applicant also failed to comply with the format prescribed in Form 36 of the RHC, which is the approved form to discontinue an action.

[21] It was not denied in this case that the plaintiff of the first action, before discontinuing the originating summons, had failed to obtain leave from the court. Not missing a beat, the plaintiffs of the second action had also ventilated that such a failure had made the NOD to be legally ineffective.

[22] It is quite safe to say that when applications are made for leave to discontinue a case, more often than not courts will grant it. This is so as it is undesirable to compel a plaintiff to pursue any litigation against his will, so long as no injustice will be caused to the defendant (*Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876; [1977] 2 All ER 591). From the available facts here, not only did the defendants of the first action want the litigation to end, but to compel the plaintiff to pursue the case without a cause of action, defies all limits of logic and concept of justice.

[23] In the normal course of event, the right of any plaintiff to discontinue the action or withdraw part thereof without leave may be exercised only if three conditions are fulfilled. The *Supreme Court Practice (Malaysian Edition)* correctly illustrated the conditions in this manner (verbatim from the book):

> (i) that the action was begun by writ. This right generally is not available to a plaintiff in proceedings begun by originating summons, nor is it available in proceedings begun by originating notice of motion;
>
> (ii) that the notice of discontinuance or withdrawal is served to the defendant This notice must be in writing, and must be clear and unequivocal, stating whether the action is wholly discontinued or specifying the particular claim which is being withdrawn, No particular form is necessary; and
>
> (iii) that service of the notice of discontinuance or withdrawal is effected within, and not later than, the time specified by r 2.

[24] Statutorily speaking O 21 r 6 of the Rules of the High Court 1980, appears to militate against the interest of the plaintiff of the first action, as this provision demands that a party who has taken out a summons in a cause or matter may not withdraw it unless with leave of the court. For a fact the first action was initiated through an originating summons. Despite all the flaws staring at the NOD under O 21 r 2(4) it is provided that:

> If all the parties to an action consent, the action may be withdrawn without the leave of the court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties.

[25] Backed by O 92 r 4 of the RHC 1980, which empowers me with all the powers that are necessary to fulfil itself as a court of law, that under PU (A) 197/2000) procedural matters are now secondary to the justice of the matter, and the defendants of the first action did not complain of the dearth of leave, what with O 21 r 2(4) statutorily allowing withdrawal without leave if certain preconditions are satisfied, I am satisfied that the NOD was good and hence effective. With the wind of change behind me, the procedural inadequacies of the NOD, if any for purposes of this case is irrelevant. As an analogy, in *Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 2 AMR 2412, Gopal Sri Ram JCA had occasion to opine:

Hakim bicara telah salah arah diri apabila memutuskan isu pematuhan formal kehendak notis pernberhentian ...

Tambahan pula, jika benar responden telah menyetujui pemberhentian tuntutan perayu itu, ketiadaan tandatangan bersama peguam responden bukan perkara relevant.

[26] The Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 through the judgment of Ahmad Fairuz JCA (asHis Lordship then was) had expressed that, preliminary objection merely on technicality, should not be allowed to obstruct the process of giving Justice to the deserving. The procedural technical objection thereafter was overruled, Likewise in *Megat Najmuddin Data' Seri Dr Megat Khas v Bank Bumtputra (M) Bhd* [2002] 1 MLJ 385, Mohtar Abdullah FCJ on the issue of procedural technicality vis-a-vis the cause of justice had occasion to express:

The duty of the Federal Court, as apex court, to ensure that the justice is done far outweighs any procedural technicality preventing it from being done. The Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhabited by the technicalities strewn in its path.

[27] With my positive finding of fact having been made, the effect wjll be that the first action come 30 November 1993, was thus effectually terminated. Likewise in the current case, anything that was filed after that effective discontinuance date would be invalid, and must necessarily be dismissed (*Solid Gold Publishers Sdn Bhd v Chan Wee Ho & Ors* [1998] MLJU 227. In *Malaysian High Court Practice* (1998 Desk Ed) applied in *DP Vijayandran v Karpal Singh* [1992] 1 CLJ 119 is authored:

The court will use its inherent jurisdiction to ensure that the failure of a party to strictly follow the procedural rules does not render its application a nullity if and only if the omission to abide strictly to the procedural rules would not cause the other party to suffer any prejudice and more importantly, if it is of the view that the application should be entertained in order that justice will be done.

[28] It must be emphasised that, even though the discontinuance had taken place without leave, no prejudice or injustice had occurred to the defendants or anyone, in the light of:

(i) the defendants having paid all their debts;

(ii) the defendants not complaining of the withdrawal;

(iii) the defendants had wanted the case withdrawn;

(iv) the plaintiifs were satisfied with the refund;

(v) no issue of counter-claim arose;

(vi) the interveners rights had not arisen when the discontinuance occurred, as they had yet to be granted the status of interveners;

(vii) the potential interveners were served with the relevant notice of discontinuance and had never undertaken any action of resuscitating this first action;

(viii) no judgement had been obtained, which could have prevented the discontinuance without leave; and

(ix) no miscarriage of justice had been occasioned by this discontinuance to anyone.

[29] Based on all the above reasons, and to avoid any misunderstanding of my order, I hereby dismiss all the encls, namely 132, 124, 156 and 114 with costs.

All applications dismissed with costs.

Reported by K Krishnan